No. 73-1290

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, *Petitioner*

v.

ITT CONTINENTAL BAKING COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the courts below were correct in holding that a negotiated Federal Trade Commission consent order which requires a firm to "cease from acquiring . . ." assets of other firms in the same industry, but which does not bar "holding" such assets, does not provide a basis for assessing daily penalties under the Clayton and Federal Trade Commission Acts (15 U.S.C. §§ 21(*l*), 45(*l*)) for "holding" assets "acquired" in violation of the consent order?

2. Whether a negotiated Federal Trade Commission consent order which bars a firm only from "acquiring, directly or indirectly . . . the whole or any part of the . . . assets of any concern . . . engaged in the production and sale of bread" is violated by a firm which enters into a contract to supply bread to a producer and seller of bread who unilaterally decides to terminate production of bread and remain in business as an independent distributor?

3. Whether a negotiated Federal Trade Commission consent order which does not by its terms apply to "successors" may nevertheless be applied to a previously unrelated successor firm, where that firm acquires the firm subject to the order pursuant to an arms-length transaction causing substantial changes in ownership and control, and such acquisition is entered into without any purpose to evade the obligations under the order?

4. Whether the Federal Trade Commission may assert accumulating daily penalties for periods long after it has completed its investigation, and after it has concluded that its consent order is being violated every day, without informing the alleged violator of its jeopardy?*

STATEMENT OF THE CASE

1. Events Leading to the Court Proceedings

The consent order at issue in this case was the result of a complaint brought in 1960 by the Federal Trade Commission, pursuant to Section 7 of the Clayton Act, to secure divestiture of certain acquired companies,

* Questions 2-4 are necessarily involved in the Government's effort to sustain and expand the judgment below.

and for other relief. (App. 57a-67a)[1] Prior to any findings in the case, Continental and complaint counsel agreed to a proposed consent order (App. 69a-71a) which was adopted without change by the Commission in May 1962. (*See* App. 79a-84a) Divestiture of certain assets was agreed to, and the consent order also prohibited Continental from "acquiring, directly or indirectly, . . . the whole or any part of the stock, share capital, or assets of any concern . . . engaged . . . in the production and sale of bread and bread-type rolls" unless it obtained the prior approval of the Commission. (App. 83a) Nowhere did the order prohibit the holding, as opposed to the acquisition, of such assets, nor did the order prohibit the acquisition of firms engaged only in sales, or only in production, of bread products.[2]

In 1965 Continental, without prior Commission approval, entered into an agreement with the Mack Baking Company ("Mack") of Bangor, Maine, by which Mack became a distributor of Continental bread products. (App. 131a-133a) Mack was at the time a producer and seller of competing bread products. The Commission has never challenged this agreement nor

[1] "App." refers to the appendix filed in the court of appeals, a copy of which has been provided by the Government in conjunction with its Petition.

[2] The Government relies heavily on an "appendix" to the agreement containing the consent order (App. 72a-78a). Petition, at 5, 15. This appendix was never adopted by the Commission (*see* App. 81a, ¶¶ 6-7), but rather, as the face of the document makes clear, was written by staff attorneys supporting the complaint to persuade the Commission to approve the consent order. The appendix therefore reflects neither the opinions nor the purpose of Continental in agreeing to the consent order, and is irrelevant to the interpretation of that order. United States v. Armour & Co., 402 U.S. 673 (1971).

suggested that it was in any way a violation of the consent order. (App. 48a)

Subsequently, in 1965 and 1966 Continental entered into similar agreements with three small western baking companies, Bon Ton, Inc. ("Bon Ton"), Wyoming Baking Company ("Wyoming"), and Sheppard Baking Company ("Sheppard"). (App. 19a-47a) The owners of each of these companies had unilaterally decided, due to economic and personal problems (App. 27a, 45a), to terminate bread production but to remain in the bread business as distributors. The agreements each provided that Continental would supply bread products to the three companies for resale on their own routes and to their own customers. (App. 28a, 36a, 45a-46a) None of the companies was competing with Continental when the agreements were made. The result of the agreements was that none of the three bakers was eliminated from the market as they would have been without Continental's supply contracts. Each maintained its own routes, its own customers, and full control over sales and employment policies.[3]

On September 13, 1968, Continental's business operations and assets were merged with a wholly-owned subsidiary of International Telephone and Telegraph Corporation ("ITT"), called ITT Continental Baking Company ("ITT Continental"). (App. 23a) This merger, which was an arms-length transaction, resulted

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[3] In 1967 independent circumstances affecting the owners of the Bon Ton and Wyoming dealerships led them to sell the dealerships to Continental in return for cash or cancellation of indebtedness. (App. 31a, 42a-44a) At the time of the sales, neither firm was engaged in the "production and sale" of bread products. Sheppard continues to operate as an independent dealership, but is no longer supplied by Continental.

in a complete change in ownership and control of Continental. (App. 24a-25a) It is stipulated that the merger was in no way entered into for the purpose of evading the obligations of the consent order. (App. 25a)

2. The Court Proceedings

Continental submitted compliance reports to the Commission in 1966 and January 1967 stating that it had not made any acquisitions barred by the terms of the consent order. (App. 122a-126a) The Commission engaged in a fact-finding investigation of the agreements described above which was completed by June 1967, and Continental voluntarily kept the Commission informed concerning relevant developments respecting the distributorships. (App. 47a-48a) Nevertheless, Continental was never informed that any of the agreements were considered to be "acquisitions" in violation of the consent order until the present action was brought in December 1968. (App. 48a) Despite the Commission's failure to inform Continental of its jeopardy, the Government in the present suit demanded daily penalties of $1,000 against Continental from the date of the agreement with each company to the date of the filing of the complaint. (App. 5a-12a) The Government also requested divestiture. (App. 135a)

On the basis of the stipulation of facts filed by the parties (App. 19a-56a), the district court found that the consent order could be "reasonably read" to permit the three challenged contracts, but that the Bon Ton and Wyoming agreements constituted "acquisitions" in violation of the order. (Petition, App. C, p. 14A) The apparent basis for this finding was that the agreements resulted in the acquisition of "assets"—the sales routes and sales volume of the companies—even though

these "assets" were not transferred to Continental. The Sheppard transaction was distinguished on the grounds that no "consideration" had been given by Continental, despite the fact that both Continental and the Commission argued that all three transactions were identical. (Petition, App. C, pp. 14A-15A) The district court then imposed separate statutory penalties of $5,000 each on Continental for the Bon Ton and Wyoming alleged "acquisitions." (Petition, App. C, p. 16A) The district court found that the terms of the consent order prohibited acquisitions only and therefore rejected the Commission's demand for daily penalties. (Petition, App. C, p. 15A)[4] It also refused to order divestiture but entered an injunction in the language of the consent order. (Petition, App. C, pp. 15A-16A)

The court of appeals reversed the district court as to the Sheppard transaction, but otherwise affirmed. (Petition, App. A, pp. 9A-10A) With respect to the issue of daily penalties, the court held:

> "The only reference in the order is to the 'acquiring' of such businesses [engaged in the production and sale of bread products] . . . .
>
> "This consideration of the order leads us to agree with the trial court as to whether the violations found were continuing or not . . . .

* * *

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[4] The district court also stated that it would appear "unreasonable to allow the commission to knowingly let daily penalties acrue without giving notice of the commission's position at the earliest reasonable time." However, the court found it unnecessary to resolve this issue definitively since on its reading of the consent order there was no basis for daily penalties. (Petition, App. C, p. 15A)

"... [T]he scope of a consent decree must be discerned within its 'four corners,' *United States* v. *Armour & Co.,* 402 U.S. 673, and must be construed 'as it is written.'" (Petition, App. A, pp. 4A, 9A)

ARGUMENT

In this case the Government asks this Court to review the refusal of the lower courts to assess daily penalties for allegedly improper acquisitions. It alleges that the decision below would hamper the Commission's enforcement programs and that the decision conflicts with the recent decision of the Court of Appeals for the Eighth Circuit in *United States* v. *Beatrice Foods Co.,* No. 73-1120 (8th Cir., March 8, 1974).[5] The controversy turns solely upon the construction of particular language used in an FTC consent decree. For several reasons the case does not warrant plenary review in this Court.

First, the Commission can resolve the problem in the future merely by making a simple change in the wording of its decrees to make them apply specifically to the "holding" as well as the "acquiring" of companies. While the Government asserts that other outstanding decrees have already used the language construed by the lower courts in this case, the FTC is empowered to "modify" existing decrees in the public interest through appropriate proceedings. 15 U.S.C. § 45(b). Consequently, the agency can readily prevent any repetition of this problem without occupying the time of this Court.

Second, the Government's argument on the merits is essentially the same as the argument that it made, and

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[5] The *Beatrice* decision was relied upon in the supplemental memorandum recently filed by the United States.

that this Court only recently rejected, in *United States v. Armour & Company,* 402 U.S. 673 (1971). There, as here, the Government in substance sought by interpretation to expand a consent decree beyond its language on the ground that it would serve regulatory purposes to prohibit conduct that the decree did not expressly reach. *Armour* correctly rejected this approach in construing bargained-for consent decrees; the lower courts in this case followed *Armour;* and there is no necessity for further review of the now settled principle established in *Armour* by this Court.

I.

In *Armour* the Government sought to prevent the Greyhound Corporation, which engaged in certain retail food businesses, from acquiring the stock of Armour, a major meatpacker, which was subject to a consent decree prohibiting it from engaging in those same retail food businesses. The Government argued that the "purposes" of the decree would be "frustrated as much by a retail food company's acquisition of a meatpacker as they would be by a meatpacker's entry into the retail food business." 402 U.S. at 681. The Court did not dispute this claim, but rejected the argument on the following basis:

> "If the parties had agreed to such a prohibition, they could have chosen language that would have established the sort of prohibition that the Government now seeks."
>
> * * *
>
> "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms . . . . Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties

> have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." 402 U.S. at 679, 681-82.

Here, just as in *Armour,* the Government argues that interpreting the consent order to prohibit only "acquisitions" and not "holding" the assets so acquired "frustrates the basic purpose of the order." Petition, at 13. Assuming *arguendo* that the interpretation of the order by the lower courts in this case might frustrate the *Commission's* purpose in adopting the consent order, it cannot be said to frustrate the purposes of the consent order itself. The order explicitly prohibits Continental only from "acquiring . . . assets . . . ." Where the Government has wished to prohibit companies from holding as well as acquiring assets, and the defendant has agreed, the consent orders have so stated. *E.g., United States* v. *General Motors Corp.,* 1968 Trade Cas. ¶ 72,356 (N.D. Ohio 1968). No amount of argument about the "reasons" or the "purpose" for barring acquisitions (Petition, at 12-15), can change the fact that the negotiations between Continental and the Commission resulted in a consent order which barred only acquiring, not both acquiring *and* holding, assets.[6]

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[6] The Government's citation of United States v. DuPont & Co., 353 U.S. 586 (1957) (Petition, at 13-14) in this regard is inapposite. In that case, the Court held only that the question whether DuPont's acquisition of General Motors Stock in 1917 violated the original Clayton Act could be determined by reference to later developments. 353 U.S. at 497-98. The Court did not decide that DuPont's "holding" of the previously acquired stock was a violation in itself, which is the necessary implication of the Government's position here. Furthermore, as *Armour* makes clear, questions of what Section 7 of the Clayton Act does or does not prohibit are completely irrelevant to questions of the proper interpretation of a specifically limited consent order.

The Commission cannot now rewrite the bargain struck in 1962 by asking this Court to "interpret" the order so as to include new prohibitions—the precise approach disapproved in *Armour*. The decisions of the courts below are manifestly in accord with the principles of *Armour,* and the question posed by the Government is insubstantial in light of this Court's own recent pronouncement.

The importance of the court of appeals' decision to Commission enforcement has also been greatly overstated by the Government. The contention that the decision will harm the Commission's enforcement program by removing the possibility of substantial penalty assessments against violators (Petition, at 11), necessarily assumes that respondents to orders regulating acquisitions are eager to violate the terms of those orders as soon as the monetary penalties become small enough. Such an assumption of eager interest to violate the law is unjustified as a general rule and is unsupported by the record of the present case, where the district court expressly found Continental's actions were based on a "reasonable" reading of the consent decree. See p. 5, *supra.* Moreover, this present order has had no legal effect since at least May 1972, and there have been no acquisitions in those two years.

The professed fears of the Government in this regard are especially unpersuasive in view of its own assumption that divestiture may be granted by a court in a civil penalty proceeding. Petition, at 11. Although the Government argues that divestiture is not a sufficient deterrent, it cannot be seriously claimed that divestiture of a profitable acquisition is not as costly and drastic a remedy as are daily monetary penalties.

Coupled with an initial penalty for an improper acquisition, the remedy of divestiture in appropriate cases gives the Government an ample arsenal of sanctions.

Moreover, the Commission has ample power to secure the ends it seeks without a retroactive expansion of the existing decree and without further litigation in this Court. With respect to all future decrees, the Commission is free to include a precise prohibition against "acquiring or holding" forbidden assets in any decree it drafts after any agency proceeding and to insist on such a prohibition before it agrees to a consent order. Any company entering into a consent decree of this type will at least have fair warning of its potential liability.

The Government asserts that there are 66 outstanding orders using language similar to the decree in this case. However, the Commission has authority to "modify" existing decrees after appropriate proceedings and could thus move to introduce an "acquiring or holding" prohibition into existing decrees where circumstances warranted.[7] Such an outright modification, however, would necessarily apply to subsequent acquisitions and would not have the unfair retroactive effect of the Commission's present "interpretative" approach.

In fact, policy considerations, invoked here by the Government, militate far more strongly against the Government's position than for it. The Government's claim here for daily penalties up to the date of the complaint is based upon a substantial unilateral rewriting

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[7] The Commission is presently considering a purported "modification" of the consent order here involved to extend its term to April, 1977. ITT Continental is opposing this "modification" on grounds not presented by an "acquiring or holding" clause.

of terms of a bargained-for consent order. See pp. 14-15, *infra*. If a company knows that a consent decree can be rewritten and applied retroactively whenever the Commission later contends that the limitations do not serve the Commission's purpose, the company will have a strong incentive to litigate in the first instance rather than compromise. Inasmuch as consent decrees constitute a primary antitrust enforcement mechanism of the Commission,[8] even a small disincentive to negotiating such decrees would have significant adverse effects on the Commission's program.

In its supplemental memorandum the Government urges that certiorari should be granted because of a conflict assertedly created by the recent decision of the Eighth Circuit in *United States* v. *Beatrice Foods Co.*, *supra*. In this instance the asserted conflict does not justify review both because the controversy is not likely to recur and because the Commission can readily eliminate the problem entirely by administrative action. As already noted, the questions raised by cases such as this involve no issue of statutory construction but simply the interpretation of consent orders of limited scope. As only a limited number of similar orders exist, the decision will have little practical effect in the future. The precise question here presented is, in fact, unlikely ever to arise again.[9]

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[8] As indicated by the preponderance of consent decrees among the 66 orders listed in the Petition, App. E. See also Note, Flexibility and Finality in Antitrust Consent Decrees, 80 Harv. L. Rev. 1303 (1967).

[9] So far as ITT Continental is aware, the present dispute has arisen only in this case and in *Beatrice* despite many years of Commission enforcement of decrees containing similar language. And it would be both remarkable and perverse if the Commission fails to insist on broader language, to prohibit both "acquiring" and "holding," in its future decrees.

As we have previously shown, moreover, the Commission can readily resolve any enforcement problems allegedly created for it by the Tenth Circuit's decision by drafting future anti-acquisition orders to reach the conduct it here seeks to proscribe. With respect to existing orders, it may employ the statutory procedures to modify them without resort to this Court. In short, the asserted conflict between the courts of appeal is essentially a matter of academic interest. The effect of either decision is quite limited and even that small effect can be eliminated by appropriate Commission action and without further litigation in this Court. This Court should not grant certiorari simply to allow the Government to rewrite the consent order "as it might have been written." *United States* v. *Armour & Co., supra,* at 682.

II.

If, contrary to our contention that the question presented by the Government does not warrant plenary review, the Court should grant certiorari, certain other issues will become prerequisite to the Government's attempt to sustain and expand the judgment below. The first is whether the three supply contracts were a violation of the consent order against acquisitions. The second and third relate to the period for which daily penalties could be asserted. Obviously, if the supply contracts were not an act of "acquiring," they would also not be an act "holding," and no daily penalties could be assessed. To the question we now turn briefly.

The supply contracts with Bon Ton, Wyoming, and Sheppard were held by the court of appeals to be violations of the consent order because the exclusive dealerships were "effective to induce the owner to close the local bakery," enabling Continental to obtain "the

market and volume . . . a principal asset of the bakery." Petition, App. A, p. 7A. Beyond the fact that the record is devoid of any evidence that Continental "induced" any of the bakers to cease production, the decision that a supply contract for a limited term constitutes an illegal acquisition of market and sales volume is directly contrary to the plain meaning of the words of the consent order, and to the position taken by the Commission itself in other cases. *E.g., National Dairy Products Corp.* (FTC Dkt. 6651, 1969). Where the Commission has sought to prevent companies from engaging in the type of supply contracts entered into by Continental, it has negotiated consent orders which include explicit prohibitions of such contracts. *E.g., Textron, Inc.* (FTC Dkt. C-1740, May 22, 1970);[10] *Frito-Lay, Inc.* (FTC Dkt. 8606, Sept. 12, 1968);[11] *Hercules, Inc.* (FTC Dkt. C-1794, Sept. 23, 1970).[12] No such provisions were included in the present consent order.

Thus, as with the question of "holding" assets, the Government is again forced to argue that "acquiring" does not mean what it says, but rather that the term covers the mere entry into a supply contract with a firm that has unilaterally ceased production of its own products. There is even less justification for distorting

[10] Respondent prohibited from obtaining "in whole or in part, the market share of any such concern."

[11] Prohibition applied where "such concern discontinues producing any of said products under a brand name or label owned by such concern and thereafter distributes any of said products under any of respondent's brand names or labels."

[12] Prohibition applied where "such concern discontinues the production of any of said products and thereafter transfers or makes available to respondent its customer lists or customer accounts."

the plain meaning of the consent decree in this respect than there is with regard to the penalty issue. Even if the Court accepted the Government's contention that the "purpose" of the order must be considered in establishing its scope, an examination of the order, the complaint on which it is based, and the appendix to the initial agreement will reveal no expression of intent by either party to prohibit the supply contracts here in question. Although in considering the penalty issue the court of appeals recognized that *Armour* prohibited such expansive interpretations of consent orders, it failed to apply the same principles to the initial question of whether a violation had occurred at all.[13]

The Government's claim for daily penalties necessarily involves two further issues: (1) whether the consent order was binding on Continental's successor after Continental ceased to exist; and (2) whether the Commission may lawfully allow claims for daily penalties to pile up without putting the alleged violator on notice of its jeopardy.

The district court's holding that the consent order was binding on Continental's successor creates another flat conflict with the holding in *Armour*. In that case, as has been seen, the Court held that a consent decree must be strictly construed according to its terms. Be-

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[13] There is some suggestion that the courts below relied on Continental's eventual acquisition of the Bon Ton and Wyoming distributorships to find a violation of the consent order. Petition, App. A., pp. 5A-6A; App. C, p. 14A. To the extent that this is so, the decisions are clearly inconsistent with *Armour*. At the time of the acquisition of these distributorships, they were no longer involved in the "production and sale" of bread products. The consent order is unquestionably limited to such concerns, and thus neither Bon Ton nor Wyoming could reasonably be held to fall within the prohibitions of the order.

cause the decree did not purport to apply to "successors and assigns," its prohibitions could not be applied to Greyhound, the successor to defendant's stock. 402 U.S. at 680. The consent order here applied only to Continental, and nowhere mentioned its "successors and assigns." This omission should have been dispositive of the question, in accord with *Armour,* particularly in view of the Commission's ability to include such a clause where it intends the order to apply to successors. *E.g., Cole National Corp.,* 71 F.T.C. 1504, 1510 (1967).

Instead of following *Armour,* the district court held that ITT Continental, in its merger contract with Continental, had "assumed the liabilities of Continental . . . including the liabilities under the Federal Trade Commission consent order." Petition, App. C, p. 16A. The agreement, however, cannot be read to extend the application of a consent order which would not otherwise have applied. Such a reading, which in essence makes the Commission a third-party beneficiary to the merger contract, would require a clear showing that ITT Continental intended gratuitously to confer such a benefit upon the Commission. No such showing was made in this case.

Beyond its incompatability with the *Armour* decision, the district court's ruling deviates from a long line of precedents which holds that a firm cannot be bound by an order entered against its predecessor unless there is substantial continuity of ownership and management so that the successor appears to be merely a means of avoiding the order's requirements. *E.g., Walling* v. *Reuter,* 321 U.S. 671 (1944); *NLRB* v. *Tempest Shirt Manufacturing Co.,* 285 F.2d 1 (5th Cir. 1960); *P. F.*

Collier & Son, Corp. v. *FTC,* 427 F.2d 261 (6th Cir.), *cert. denied,* 400 U.S. 926 (1970). The undisputed facts of the present case illustrate that such considerations are not even remotely applicable, for there was a complete change of ownership and control of old Continental as a result of the 1968 acquisition, and it is stipulated that the merger was not an effort to avoid the prohibitions of the consent order.

Lastly, the term for which daily penalties could be applied depends on whether the Commission may lawfully assert daily penalties for a period during which it has had available all the relevant facts pointing to an alleged violation and has needlessly allowed those penalties to accumulate by failing to advise the private party of its fast-increasing potential liability. In violation of its own practice and procedures,[14] the Commission here failed to inform ITT Continental of its alleged violation of the order until the enforcement proceeding was initiated, despite the fact that the Commission had completed its investigation of the transactions over one year previously, and had decided to bring the penalty action at least four months prior to its initiation. ITT Continental was thus denied the opportunity to limit the accrual of substantial penalties by anticipating the penalty action with a declaratory judgment action of its own or by other appropriate means. See, *St. Regis Paper Co.* v. *United States,* 368 U.S. 208, 225-26 (1961).

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[14] Where, as here, compliance reports have been accepted by the Commission, its own rules require notification to a respondent if the Commission subsequently comes to believe that a violation of the order exists. 16 C.F.R. § 3.61(d). Interestingly, after the district court's decision in this case, the Commission amended its rules to provide for the first time that it may institute enforcement proceedings "without prior notice of any kind to a respondent . . . ." FTC Rule 3.61(a), 37 Fed. Reg. 5610 (1972).

Continental took just such an approach on another matter in *Continental Baking Co.* v. *Dixon,* 283 F. Supp. 285 (D. Del. 1968), and the court there held that:

> "the Commission has the obligation to determine and to inform parties whether and to what extent their conduct may be in violation of a cease and desist order. It is only after the Commission has made such a finding that the penalties contemplated by 15 U.S.C. § 45(1) could be assessed, and only from that day forward. Any other interpretation of the statute and regulations would raise serious questions of due process." *Id.* at 287-88.

Elementary fairness forbids the notion that the Commission may sit quietly with full knowledge of all relevant facts and then assert daily penalties for an allegedly "continuing" violation. Before the substantial penalties demanded by the Government here may be imposed, this issue must be resolved.

Finally, an additional serious question of due process is raised by the Government's attempt to collect daily penalties for conduct that Continental reasonably did not suppose to come within the decree's ban as actually written. This Court has held that a penalty may not be imposed where the Government standard is such "that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 287 (1961), *quoting from, Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926). See also *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966). The district court here explicitly found that "competent counsel could reasonably read [the order] as not prohibiting" the supply contracts, and the court of appeals did not dispute this finding. In fact, the lower courts'

conclusion that the supply contracts violated the consent order involved a substantial departure from the terms of that order. Were the Government to prevail, ITT Continental would be liable for substantial penalties for violation of an order as to which "men of common intelligence" could differ without having received any notice whatever that a new interpretation was contemplated. Fundamental considerations of fairness must surely prohibit such a result.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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